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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 975

OPERATING ENGINEERS LOCAL UNION NO. 3, an unincorporated association, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, HAROLD L. BOWEN, JAMES F. CHURCH, P. H. McCARTHY, JR., et al.,

Petitioners,

vs.

B. R. BURROUGHS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioners Operating Engineers Local Union No. 3, The International Union of Operating Engineers, Harold L. Bowen, James F. Church and P. H. Mc-

Carthy, Jr. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Northern District of California, Southern Division, now the United States District Court for the Northern District of California vacating discipline imposed on respondent by Operating Engineers Local Union No. 3 and the International Union of Operating Engineers and enjoining each from imposing discipline on respondent by reason of his acts which acts will more fully appear hereafter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed as Appendix A hereto, is officially reported in ..... Fed.2d ..... and is unofficially reported in 72 LRRM 2577 and 61 LC ¶10386. The case number in the Court of Appeals is No. 22786.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1969. On November 14, 1969 an order denying Petitioner's Petition for rehearing by a majority of the panel Judge Ely dissenting and rejecting the suggestion for rehearing was made and entered and on November 19, 1969 an Order Staying Issuance of Judgment was made and entered on November 20, 1969 pending filing, consideration and disposition by

this Court of a Petition for a Writ of Certiorari to be made by petitioners provided such petition is filed in the Clerk's office of the Supreme Court of the United States on or before December 14, 1969. Which date was by order dated December 10, 1969 changed to December 22, 1969.

Jurisdiction is based on 29 USC §412, 29 USC §411(a)(4) and 29 USC §529 and in the Court of Appeals under 28 USC §1291 from the final Order and Judgment made and entered by the District Court in this matter, and in this Court under 28 USC §1254(1).

QUESTIONS PRESENTED FOR REVIEW

While there are but two basic questions presented for review, they may be variously stated depending on what decisional criteria appear paramount.

The first question concerns the equity jurisdiction of the District Court and may be variously stated as follows:

Does 29 USC §411(a)(4) in an equitable action for injunction under 29 USC §412 divest the District Court sitting in equity of the power to deny equitable relief, however unclean might be the hands of the Union member seeking relief?

Or

Did Congress in granting jurisdiction to the District Court in 29 USC §412 to issue injunctions for the protection of the legitimate right of Union members

specifically 29 USC §411(a)(4) intend to abolish, and abolish, the equitable defense of Unclean Hands?

The Second Question concerns the effect of the proviso of 29 USC §411(a)(4), which reads as follows:

> "Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof:"

with respect to the disciplining of a member with respect to a purely intra-union matter.

Absent any allegation that reasonable hearing procedures did not exist or if they did exist that they were not available or if they were available that they were futile or uncertain or that the member would be unfairly treated, the matter at issue being an internal, intra-union matter, is the requirement that the member exhaust reasonable intra-union hearing procedures, remedies but not to exceed a four-month lapse of time a mandatory requirement?

Or

In view of the fact that prior to the enactment of the 29 USC §411(a)(4) union members could be disciplined for failing to exhaust internal, intra-union hearing procedures, remedies, did Congress, when it enacted 29 USC §411(a)(4) intend to, with respect to intra-union matters, abolish the substantive law requiring a member to exhaust reasonable internal intra-union hearing procedures remedies, or did it only intend to change existing adjective law and place

a limitation on the time a member, with respect to internal intra-union matters, must spend in exhausting available reasonable internal intra-union hearing procedures, remedies?

STATUTORY PROVISIONS INVOLVED

The statute involved is the Labor-Management Reporting and Disclosure Act of 1959, Sections 101(a)(4), 102 and 609 thereof 73 Stat. 519-541.

The following sections or subsections of said Act are material and relevant to the instant case and the full text of said sections or subsections are printed in Appendix G hereof:

Title I, Section 101(a)(2) and (4);
Title I, Section 102;
Title VI, Section 609;
Constitution of the United States, Article III, Section 2, Clause 1.

STATEMENT OF THE CASE

The basis for the jurisdiction of the District Court in the first instance is 29 USC §411(a)(4), 29 USC §412 and 29 USC §529.

The Petitioners are a Local Union and an International Union, Labor Organizations within the meaning of 29 USC 402(i) and the individual petitioners are members thereof within the meaning of 29 USC §402(o) as is Respondent.

Petitioner's Territorial jurisdiction includes the Territory of Guam, the State of Hawaii, Northern California, Northern Nevada and the State of Utah with a present membership in excess of 31,000 (R 169-170).

Proceedings to elect Local Officers commenced in January, 1966 by publication of a Notice in the official paper of the Local mailed to all members, which notice was repeated in the February, 1966 edition.

In accordance with the requirements of the By-Laws additional notices concerning the forthcoming election were published in the March, April, May, June and July, 1966 editions and mailed to all of the members.

The notice in the July, 1966 issue specified among other things, (a) that the ballots and return envelopes be mailed August 10, 1966, and (b) the Ballot Box, i.e. Post Office Box, to which the return envelopes were addressed would be opened at 10 A.M., August 26, 1966 for the first and last time (R 171-172).

The cost of mail ballot election is generally reported to be in the area of $25,000.00 to $30,000.00 (R 114-115).

Burroughs actively participated in the affairs of the Union as follows:

He was:

1. a Dispatcher employed by the Local, 1946
2. a Business Representative employed by the Local, 1946-1952, and again 1955-1956 (R 173)

3. a By-Law Committeeman, 1959-1960
4. a Delegate to the International Convention, April, 1960
5. Defeated in election for office of Recording-Corresponding Secretary, November, 1960
6. Defeated in election for office of Business Manager, 1963
7. Defeated in election of Delegates to 1964 International Convention
8. Defeated for office of Trustee, 1966 (R 170-171).

Under date of December 12, 1965, Burroughs first raised objections to the conduct of the Local election by letter to the Local Business Manager (R 172) and thereafter by various letters to the Business Manager, the Election Committee, the Officers, District Executive Board Members and District Representatives, acting Executive Board Advisors, and Secretary of the Election Committee dated February 19, 1966, June 15, 1966, June 16, 1966, June 22, 1966, July 10, 1966, July 16, 1966, July 17, 1966, July 18, 1966, August 4, 1966, August 5, 1966, August 11, 1966 (R 121-168).

It was not until June 18, 1966 that Burroughs appealed to the General President and General Executive Board of the International Union (R 132, R 175) receipt of which in Washington, D.C. was acknowledged under date of June 23, 1966 (R 140). Additional matter in support of Burroughs' Appeal

was sent to the International subsequently, i.e. on June 22, 1966 (R 139), July 18, 1966 (R153) and August 11, 1966 (R 164).

That Burroughs was fully aware of his right to appeal appears from the General President's Ruling on an appeal of Burroughs dated January 30, 1966 on another subject and a decision rendered on March 21, 1966, less than two months later (R 174).

Four (4) months from June 18, 1966 was October 18, 1966 (R 176).

On August 23, 1966 three (3) days before the Ballot Box was to be opened and more than one month before the expiration of the four (4) month period, Burroughs filed as plaintiff in the Superior Court of the State of California in and for the County of San Joaquin a Complaint for Injunctive Relief numbered 88942 therein (R 176).

The Complaint makes no reference to the use or attempted use by plaintiff of any internal remedies or any appeal to the International, and it does not allege that any internal remedies were not available or if available were futile or uncertain or that he would be unfairly treated (R 55-58).

Burroughs obtained a Temporary Restraining Order dated August 23, 1966 which would have if enforced mixed valid with void ballots and voided the election. This Order on application of petitioner was replaced by Temporary Restraining Order dated August 25, 1966 which protected the integrity of the ballots (R 60-62).

Thereafter, on September 8, 1969, the Court issued its Memorandum Decision in which it held first that it had no jurisdiction by reason of 29 USC 482, secondly that the only relief for Burroughs was under Title IV (29 USC 481 et seq.) and then stated:

> "A secondary reason why this action is premature is that the petitioner has not exhausted his internal union remedies prior to the court action." (R 77)

On the next day, September 9, 1966, Burroughs as plaintiff filed in the United States District Court for the Northern District of California, Northern Division, a complaint identical with that filed in the State Court and obtained a Temporary Restraining Order identical with that issued by the State Court on August 25, 1966 (R 52-59, R 81-83, R 86-89).

On September 13, 1966 the District Court made the following Order:

> "The Court Ordered that the temporary restraining Order heretofore issued herein, dis-(s)olved, and the further hearing on this case continued to September 14th, 1966 for hearing." (R 103).

and on September 14, 1966, the counting of the Ballots having been completed, the following order:

> "The parties being present as heretofore, the further hearing in this case was resumed, and it appearing that the issue before the Court has now become moot, upon motion of counsel for the plaintiff, Ordered the proceedings herein terminated." (R 104)

Burroughs was charged by petitioner Bower:

". . . with violating Article 3, paragraph (c), Article 24 of the Local Union By-Laws and Article 17, Section 4 of the Constitution of the International Union of Operating Engineers.

"On the 23rd day of August, 1966 he commenced a civil action against Operating Engineers Local Union No. 3 in the Superior Court of the State of California for the County of San Joaquin No. 88942 in which action he sought the following relief:

"1. That a temporary restraining order be issued forthwith enjoining the Defendants and each of them from further proceeding with the election schedule to be completed August 26, 1966 or from further interference with the rights of Plaintiffs under Section 411(a)(4) of the Act.

"2. That a preliminary injunction issue pending trial enjoining all such conduct.

"3. That a permanent injunction issue enjoining such conduct.

"4. That the conduct of Local 3's affairs be under the supervision of this Court or its appointed monitor until lawfully selected officers can be elected to Local 3.

"5. For reimbursement to plaintiffs of reasonably incurred legal fees;

"6. For costs of this action;

"7. For such other and further relief as the Court may deem proper;

without in the four (4) months next preceding commencement of the civil action or at any time having exhausted all or any remedies and reason-

able provisions for hearing and appeal within the organization." (R 10-11)

and charged by Appellant Church similarly but by reason of the action filed by Burroughs in the United States District Court in Sacramento, California (R 12-13).

Burroughs was found guilty by secret ballot after trial on February 2, 1967 in Sacramento on the Church charge by a vote of 220 to 134 with 15 ballots unmarked and was fined an amount equal to the additional election expense caused by that lawsuit, i.e. $3,499.08, plus the cost of defending that lawsuit, i.e. $1,081.51 (R 27).

Burroughs was found guilty by secret ballot after trial on February 6, 1967 in Stockton on the Bower Charge by a vote of 289 to 86 with 10 unmarked ballots and was fined an amount equal to the additional election expense caused by that lawsuit, i.e. $1,674.96, plus the cost of defending that lawsuit, i.e. $902.78 (R 27).

Burroughs appealed and requested the waiver of payment of the fine pending appeal, the Local Union concurred in Burroughs' request, and the payment of the fine was waived pending appeal (R 28).

On June 30, 1967 the International rendered its decision as follows:

". . . it was regularly moved and seconded that the decisions of Local Union No. 3 and the penalties imposed by it against the appellant be upheld and affirmed but that the enforcement of such penalties by Local Union No. 3 be stayed

for a period of 3 years at which time the penalties shall be vacated, provided that the appellant does not within that period of time, directly or indirectly, take any action or support any action violative of Article XVIII (XVII), Section 4 of Constitution of the International Union, and provided further that should the appellant take or support any such action within such period of time, the penalties imposed by Local Union No. 3 shall immediately and automatically become operative and enforceable by Local Union No. 3. This motion was put to a vote and was unanimously carried" (R 20-21).

Thereafter the Defendant commenced this action.

The District Court found on Burroughs' motion for Partial Summary Judgment that:

1. The doctrine of "unclean hands" does not preclude plaintiff from obtaining relief.

2. The discipline of Burroughs based on the charges set forth above was and is in violation of the Labor-Management Reporting and Disclosure Act, 29 USC 411(a)(4) and 529 in that it limits the right of Burroughs to institute actions under said Act and disciplines a member for exercising rights to which he is entitled under said Act.

3. Article XVII, Section 4 of the Constitution of the International Union of Operating Engineers is similarly in violation of said Act as applied to the facts. (Appendix E, pp. xxi-xxii.)

The District Court gave Partial Summary Judgment against Petitioner as follows:

"It Is Hereby Ordered, Adjudged and Decreed that the discipline imposed upon plaintiff by defendant Labor Organizations because plaintiff instituted a legal action or legal actions without having first exhausted four months internal union remedies under the facts of this case is in violation of 29 U.S.C. Sec. 411(a)(4), illegal and void, is hereby quashed, vacated and set aside.

It Is Further Ordered, Adjudged and Decreed that defendant Labor Organizations and each of them are forever enjoined from in any way disciplining plaintiff by reason of his having commenced and prosecuted Case No. 88942 in the Superior Court of the State of California in and for the County of San Joaquin and thereafter Case No. 9933 in the United States District Court for the Northern District of California, Northern Division or either of them.

And It Is Further Ordered, Adjudged and Decreed that there being no just reason for delay let a final judgment be entered accordingly as to the Injunction." (Appendix F, pp. xxiii-xxiv.)

From the Final Judgment (order) and Injunction Petitioner appealed.

The United States Circuit Court for the Ninth Circuit by a divided court affirmed the Judgment of the District Court stating:

"Appellants urge that in this case the rights which Burroughs sought to protect were member rights as distinguished from employee rights, that the subject matter of the state and federal court actions concerned intra-union matters and did not touch the public domain, and that the actions in the state and federal courts were not

bought in good faith,[4] and that for each or all of these facts Burroughs should be denied relief. Although appellant's position is not foreclosed by existing case[5] authority we do not adopt it." (Appendix A, p. iv.)

"[4]The District Court concluded that the doctrine of 'clean hands' did not preclude relief. If there were a relevant issue of good faith, the summary judgment could not stand in this case because conflicting inferences could be drawn from the record." (Appendix A, p. iv.)

[5]The rights involved in Marine Workers were employee rights protected by § 7 of the National Labor Relations Act (29 U.S.C. § 157) and the court does say: 'Thus § 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play.' Marine Workers, *supra* at 424. [391 U.S. 418, ... S.Ct. ....., 20 L.ed.2d 706.]

And: 'We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not ground for expulsion from a union.' Marine Workers *supra*, at 428.

In Ryan v. International Brotherhood of Electrical Workers, 361 F.2d [....] (7 Cir. 1966) the basic controversy did not relate to an exclusively internal union matter, and in Roberts v. N.L.R.B., 350 F. 2d 427 (C.A. D.C. 1965), the rights involved were employee rights. Both Ryan and Roberts suggest that the element of good faith might be considered if the suits were brought to harass." (Appendix A, p. iv.)

The Court then held that the members' right to institute an action in any Court was in no way limited and that the equitable doctrine of unclean hands has no application and that good faith or lack of it in commencing any action in any Court by a member of the Local Union is of no consequence.

The dissent asserts the right of a Court sitting as a Court of Equity to exercise to the full its historical equitable powers stating:

"It has been axiomatic that equitable relief will not be granted in a case wherein plaintiff comes to Court with unclean hands" (Appendix A, p. vii.)

and concludes

"If the majority is correct in its view that the pleadings and affidavits sufficiently presented a genuine dispute concerning the doctrine of unclean hands, then I strongly disagree with its conclusion that the District Court had no power to apply the defense. I would therefore remand the cause for the District Court's determination, in a plenary proceeding, of whether the appellee, by his own conduct, had forfeited any right to the favor of equitable relief.[6]" (Appendix A, pp. xi-xii.)

"[6]An enlightening decision in the area of union disciplinary procedures, rendered on August 25th of this year, has just now, and after the above was written, come to my attention. *International Molders' & Allied Workers Union Local No. 125*, 178 NLRB No. 25, 1969 CCH Lab. L. Rep. ¶ 21,164 (1969). There, the Board ruled that a union member who filed a decertification petition may be expelled from the union but cannot be fined. The Board carefully differentiated between discipline for filing unfair labor practice charges, as in *Marine Workers*, and discipline based on petitioning for decertification. It then cited our court's opinion in *Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967), for the proposition that a union can expell a member for filing a petition to decertify. The rationale of Price was that the petition of decertification attacked the very existence of the union and that the member should not be able to do this while remaining a member and privy to his union's election campaign and stategy.

In *International Molders'*, the Board did not interpret *Marine Workers* as requiring that it abandon its attitude toward decertification petitions. In addition to the reasoning in *Price*, noted above, the Board pointed out that suspension or expulsion was the most effective means of defense against the decertification petition and that the member's right of access to the Board should, on balance, give way to the union's right of self-defense. On the other hand, the Board concluded that a fine alone served no adequate defensive purpose, since the member would retain his advantageous position for infighting. Interestingly enough, the dissenting opinion in the

case does not challenge the majority's conclusion that *Price* remains viable. Instead, it urges that the union should also be empowered to fine its members for filing decertification petitions.

The analogy to our present situation is apparent. Here, Burroughs' actions threatened, and undertook to frustrate, the union's ability to conduct an election, without which the union could not function as a truly representative organization. The sanction was, by its terms, designed as self-defensive, and Burroughs was not divested of his membership. The disciplinary order imposing the fine was suspended upon the condition that Burroughs not file another similar suit within the next three years. Such a conditional sanction can only be interpreted as defensive, and had the union eventually sought to impose it because of the good faith instituting of a non-frivolous action, the courts could have properly enjoined the imposition."

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Ninth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.

2. The Court of Appeals for the Ninth Circuit has decided a federal question in a way which is in conflict with applicable decisions of this Court.

3. The orderly internal government of Labor Organizations and the lawful resolution of intra-union problems, in the absence of case authority, requires the resolution of the Federal Questions involved in the instant case in the public interest.

ARGUMENT

1. THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

In their opinion the majority of the Court says:

"Although appellant's position is not foreclosed by existing case authority, we do not adopt it." (Appendix A, p. iv.)

The existing authority will be found in

N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers etc., 391 U.S. 418, 20 L.ed.2d 706 (1968);

Ryan v. International Brotherhood of Electrical Workers, 361 F.2d 942;

Roberts v. N.L.R.B., 350 F.2d 427.

In each instance the rights involved were "employee" rights and not "members" rights. This clearly appears from the footnote 5 of the majority opinion.

In the instant case the rights involved are "members" rights and not "employee" rights and as such may properly and we submit should be subject to the limitations set forth in the proviso to 29 USC(a)(4).

This follows directly from the expressed intent of one of the proviso's authors.

As stated by Congressman Griffin, one of the authors of the legislation here being considered:

> *"The proviso which limits exhaustion of internal remedies is not intended to impose restrictions on a union member which do not otherwise exist,* but rather to place a maximum on the length of time which may be required to exhaust such remedies. In other words, existing decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of 4 months is superimposed. Also, by use of the phrase 'reasonable hearing procedures' in the proviso, it should be clear that no obligation is imposed to exhaust procedures where it would obviously be futile or

would place an undue burden on the union member." (Emphasis added)

105 Daily Cong. Rec. App. A7915 (Sept. 4, 1959).

Thus it is clear that the proviso was not intended to destroy the then existing substantive doctrine of Exhaustion of Intra-Union Remedies but to modify the adjective law by placing a limitation on the period of time a member was required to spend exhausting Intra-Union remedies.

The question of the exercise of the full equity power of the District Court in an action brought under 29 USC §412 to enforce alleged rights under 29 USC 411(a)(4) has not been considered by this Court in a definitive fashion. We note, as does the majority in footnote 5 that in both *Roberts v. N.L.. R.B* (supra) and *Ryan v. International Brotherhood of Electrical Workers* (supra) there is a suggestion that the "element of good faith might be considered if the suits were brought to harass". The question of good faith is a disputed question of fact in the instant case which the majority concedes exists (footnote 4, majority opinion).

The question as to whether or not in an action under 29 USC 412 the Court has full or limited equity jurisdiction requires a definitive answer.

2. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

As pointed out in the minority opinion:

"Here the pertinent statute[2] is very similar to that involved in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 4 L. Ed. 2d 323, 80 Sup. Ct. 332 (1960). In *Mitchell* the Supreme Court held that sections 15(a)(3) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §§215(a)(3), 217, which granted the District Courts jurisdiction to enjoin the discharge of employees for having filed actions against their employers, carried with them the full equitable powers of the District Courts. The provisions there in question are comparable to those with which we are here concerned, those guaranteeing a member's right to sue his union. The question involved in *Mitchell* was whether the District Courts had been disempowered, by reason of the Fair Labor Standards Act, from rendering equitable relief beyond the injunctive power specifically conferred. In answering the question in the negative, the Supreme Court principally relied upon language found in *Porter v. Warner Co.*, 328 U.S. 395, 397, 90 L. Ed. 2d 1332, 66 Sup. Ct. 1086 (1946):

'. . . the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful con-*

struction." Brown v. Swann, 10 Pet. 497, 503.' (Emphasis added.)" (Appendix A, pp. vii-viii.)

It is obvious from the language of the statute here involved, to quote footnote 2 of the minority opinion:

> "'[2]The jurisdiction of the District Court was based on 29 U.S.C. §412: 'Any person whose rights secured by the provisions of this sub-chapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.'"

that no limitation was placed on the equitable jurisdiction of the District Courts.

To date it has been accepted that the equity jurisdiction of the Federal Courts is the same in nature and extent as that of the English High Court of Chancery.

> *Barber v. Barber,* 21 How. 582, 16 L.ed. 226;
> *Sprague v. Ticonic Nat. Bank,* 307 U.S. 161, 59 S.Ct. 777, 83 L.ed. 1184

and that

> "Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected" and authorities cited (Footnote 28).
> *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 69 S.Ct. 606, 93 L.ed. 741—Footnote 28, p. 751.

Congress could have but did not exclude either the necessity to exhaust Intra-Union remedies in its entirety or the defense of unclean hands.

Petitioners submit that when the Court of Appeals in the instant case wiped out the equitable defense of unclean hands, it went contrary to the accepted principles of this Court and Article III, Section 2 of the Constitution of the United States—for while the Constitution does not require Congress to confer equity jurisdiction on a District Court, *Lockerty v. Phillips*, 63 S.Ct. 1019, 319 U.S. 182, 87 L.ed. 1339, it did in the instant case when it said:

> ". . . may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." 29 USC 412.

Equity jurisdiction, having been conferred without limitation, is conferred of necessity, wholly and not partially.

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3. THE ORDERLY INTERNAL GOVERNMENT OF LABOR ORGANIZATIONS AND THE LAWFUL RESOLUTION OF INTRA-UNION PROBLEMS, IN THE ABSENCE OF CASE AUTHORITY, REQUIRES THE RESOLUTION OF THE FEDERAL QUESTIONS INVOLVED IN THE INSTANT CASE IN THE PUBLIC INTEREST.

We are advised by the Bureau of Labor Management and Welfare Pension Reports that approximately Fifty Thousand (50,000) Labor Organizations are registered with the United States Department of Labor.

The lawful conduct of their Intra-Union affairs is, of necessity, of vital importance to the successful operation of the Labor-Management scheme adopted by the Federal Government.

In this area the public interest requires that the duties, obligations and rights of the members of such organizations be spelled out in clear and precise language so that compliance by such organizations, by laymen, is possible.

This is an area in which uncertainty can only produce Labor-Management chaos.

If members are free to commence a civil action in any Court for any reason or no reason and may not be required in the case of an Intra-Union problem to even attempt to exhaust their internal union remedies, justice and good conscience requires that they be authoritatively told so by this Court.

What they can do with respect to the resulting chaos from a complete lack of internal discipline is their problem and unfortunately a problem about which their employer is helpless to resolve.

On the other hand, if there is to be responsible Labor Organizations, they must have the tools to enforce their obligations free from harassment.

Such was the balance we submit Congress and Representative Griffin sought but which the Court of Appeals in the instant case rejected.

In the instant case from December 12, 1965 to the date of the filing of his first suit August 23rd 1966, Burroughs had an available remedy, neither uncertain nor futile. He, however, elected to wait six (6) months before invoking the remedy.

This is clear from the Court's decision in *Edsberg v. Local Union No. 12, International Union of Oper-*

ating Engineers, 300 F.2d 785-787 (1962) in which the same constitution was involved.

We submit that properly understood the exhaustion of Intra-Union Remedies is an absolute requirement before asking the Federal Courts to intervene in intra-union activities.

As stated by the Ninth Circuit Court of Appeals in *Edsberg,* supra:

> "We need not decide whether exhaustion of remedies provided by the Union is an absolute requirement before asking the federal courts to intervene in intra-union activities" (R 106).

The difficulty with this problem stems from semantics.

The difficulties arise from the fact that for many years the Courts and lawyers have spoken and written of so-called "exceptions" to the doctrine.

Thus in *Destroy v. American Guild of Variety Artists,* 286 F.2d 75 we find the Court saying at page 79:

> "If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to the courts has been almost entirely swallowed up by the exceptions phrased in broad terms."

There are no "exceptions". What we have is the impact of other equally valid legal principles on the Doctrine of Exhausion of Internal Remedies.

First—There must be a remedy. Obviously if there is no intra-union remedy the rule can have no application. This is no "exception".

Second—The remedy must be neither uncertain nor futile—it must be one capable of being used. An unreasonable remedy is no remedy. This is no "exception".

Third—The remedy must be one that meets the test of due process. This is no "exception": procedures in the Courts can be subject to ancillary attack for this reason by various types of writs.

Fourth—The body or individual given the authority to decide the matter must be fair and impartial and may not prejudge the issue. This is no "exception". Here the basic doctrine of a fair trial comes into play, and the Courts are subject to ancillary attack for the same reason.

In other words, the doctrine, the rule is subject to all of the limitations that all Courts and quasi-judicial bodies are subject to. But these are not "exceptions".

Thus an action brought in the Federal Court because there is no remedy, or if there is a remedy because it is uncertain or futile is not an exception to the doctrine of exhaustion of Internal Intra-Union Remedies. The facts which call the rule and doctrine into being do not then exist. This is not an exception.

Again, if there is a lack of due process or a fair trial, we do not have an exception to the rule. We do

have a question as to whether any "remedy" in fact exists and is available.

The word "remedy" imports one which pays due regard to due process and fair play, one in which the member has, to use a colloquialism, "a fair shake".

Now the plaintiff herein did not in the Superior Court in Stockton or in the Federal District Court in Sacramento allege that he brought the suit or action:

1. Because there was no remedy available,

2. Because there was a defect of due process, or

3. Because he would not get a fair hearing.

Had he so acted, we would not be here since the issue would have been not the application of the doctrine of exhausion of remedy but whether the doctrine under the facts was applicable. These questions honestly and seriously urged, and they were not, would have placed before the Court the basic question —Did the member have an Intra-Union remedy?

Now, when we read 29 USC 411(a)(4) which provides as follows:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any ju-

> dicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislature: *Provided That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a fourth-month lapse of time within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof: And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition." (Emphasis added)

It is clear that if "reasaonable hearing procedures" exist, the prohibition against bringing an action in a Court for a period of four months is absolute.

If the question is whether or not "reasonable hearing procedures" exist, then the doctrine has no application unless it is determined that "reasonable hearing procedures" exist and of course resort to the Courts would be proper to determine that issue.

The issue, however, would not be the member's grievance but whether "reasonable hearing procedures" were provided, and thus if they were and the Court so found, an attempt to further litigate the grievance would call the Constitutional provision prohibiting such suits into effect. If, however, the Court found that no "reasonable hearing procedures" existed, then there is no remedy to exhaust, and the Constitutional provision is of no force or effect.

However, that was not the case here. There was no attack on the Constitutional provisions approved in *Edsberg v. Local Union No. 12, I.U.O.E.* (supra) some four years prior. There was no attack on the General President or the General Executive Board in either the Stockton Superior Court action or that in the United States District Court in Sacramento. There was no question of due process or a fair trial.

In the suit brought in the Stockton Superior Court sitting in Stockton, the Court made and entered its order as follows:

> "A secondary reason why this action is premature is that the petitioner has not exhausted his internal union remedies prior to the court action.
>
> "Sections 411 and 482 of the 1959 Act provide that a member is not entitled to bring a court action unless he has first exhausted his hearing procedures and appeal remedies within the Union.
>
> "It has been held that this requirement includes the appeal remedies within the International parent union as well as the Local (Edsburg v. Local 12 of the Operating Engineers, 300 F.2d 285 [Calif.Dist.Ct.]).
>
> "The Local and/or the International are then given four months to redress the wrong before a court action is permissible.
>
> "In the present case the petitioner exhausted his remedies within his Local but did not commence his appeal remedies within the International until late June of 1966. The International

month time limit in which it may act has not has not granted him any redress but the four expired."

While there is considerable diversity of opinion among the Circuits, they were in agreement with respect to Congressional Intent, namely that Congress desired to guarantee every member the right to test union action in the courts and at the same time to preserve intact the doctrine of exhausion of internal remedies with the limitation that no more than four months need be devoted to exhausting reasonable procedures.

See:

Destroy v. American Guild of Variety Artists, 286 F.2d 75, cert. denied 366 U.S. 929;
Harris v. International Longshoremen's Ass'n, Local 1291, 321 F.2d 801.

In *Destroy v. American Guild of Variety Artists* (supra), we have a complete absence of a remedy.

In *Harris v. International Longshoremen's Ass'n Local 1291* (supra), we have a case in which the dispute was intra-union, where there was an intra-union remedy which was neither uncertain nor futile, i.e. a factual situation falling within the ambit of the doctrine of exhaustion of internal remedies, and the Court applied the doctrine.

Thus we submit that in those cases in which the doctrine of exhaustion of internal remedies applies, the requirement is absolute.

In those cases in which a member sues and in good faith pleads a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies does not apply, he is protected by the Statute whether he wins or loses.

That in all other cases he is required first to exhaust, for a period of not to exceed four (4) months, his Internal Intra-Union Remedies or be subject to discipline.

Such an interpretation of 29 USC 411(a)(4) and 29 USC 412 is, we submit, in keeping with the Congressional intent but whether we be right or wrong a definitive answer by this Court will be in the public interest.

CONCLUSION

Wherefore petitioner prays in the interest of a final determination of the questions involved, particularly in an area in which clear lines of responsibility are vitally necessary to the day to day operations of what is now an essential and important segment of our economy that the writ herein sought be granted.

Bluntly it is more important that the issues be decided than that petitioner be in the end successful, and it is in this context that the writ is sought.

Dated, San Francisco, California,
December 10, 1969.

Respectfully submitted,
J. ALBERT WOLL,
Attorney for Petitioner.

McCARTHY, JOHNSON & MILLER,
P. H. McCARTHY, JR.,
JACK B. McCLELLAN,
Of Counsel.

(Appendices Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPERATING ENGINEERS LOCAL UNION NO. 3, an unincorporated association, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, HAROLD L. BOWEN, JAMES F. CHURCH, P. H. MCCARTHY, JR., et al., *Appellants,* vs. B. R. BURROUGHS, *Appellee.*	No. 22,786

[October 1, 1969]

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: ELY and CARTER, Circuit Judges, and SMITH,* District Judge.

SMITH, District Judge.

We are here concerned with the extent to which the "protection of the right to sue" section of the "Bill of Rights of Members of Labor Organizations"[1] limits the power of a union to discipline its members for suing a union and its officers.

*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

[1]"(a) Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the busi-

The plaintiff and appellee, B. R. Burroughs (Burroughs) was a member of appellant, Operating Engineers Local Union No. 3 (Local), a local union affiliated with the appellant, International Union of Operating Engineers (International). The Local conducted an election of officers in August of 1966. The ballots were mailed August 10, 1966 and were opened August 26, 1966. Before the election Burroughs complained of the election procedures to various officers and committees of the Union, and on August 25th secured an order restraining the opening of the ballot box from a Superior Court in California. On September 8, 1966, the Superior Court dissolved the temporary restraining order, and on the 9th of September Burroughs secured a restraining order from a United States District Court. This order was dissolved on September 13th and the action was dismissed as moot on September 14, 1966.

Subsequently Burroughs was charged with violations of Article XVII of the Constitution of the International[2] for filing the state

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ness of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

"(4) No labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceedings, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."

"(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect." 29 U.S.C. § 411(a)(4)&(b).

[2]"No suit or other action at law or equity shall be brought in any court and no proceeding shall be initiated before any administrative agency by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. This provision shall only require resort to internal remedies for a period not exceeding four (4) months. Any member violating this provision, shall, in addition to the penalties prescribed in the Constitution and Ritual, be subject to a fine equal to the full amount of the costs in-

and federal actions. He was tried by the Local and fined. Upon appeal to the International the "penalties" imposed were "affirmed" but their enforcement was stayed for a period of three years, at the end of which time they were to be vacated if Burroughs did not in the interim violate any provisions of Article XVII, Section 4, of the International Constitution.

This action was brought by Burroughs to restrain the enforcement of the penalties and for actual and punitive damages. The District Court granted plaintiff's motion for a partial summary judgment, adjudging the discipline imposed on Burroughs by the Union to be void and enjoying the Union from in any way disciplining Burroughs for having filed the actions in state and federal court.

The first question posed by this appeal is whether a union may discipline a member who initiates a court action against it or its officers without spending at least four months in the exhaustion of the Union's internal hearing procedures. The answer to this question turns upon the meaning of 28 U.S.C. § 411(a)(4).

In *Industrial Union of Marine and Shipbuilding Workers v. N.L.R.B.*, 379 F. 2d 702 (3 Cir. 1967), the Court of Appeals for the Third Circuit specifically held that section 411(a)(4) gave the Union authority to require that the members resort to reasonable intra-union procedures. On appeal the Supreme Court, speaking through Mr. Justice Douglas, just as specifically rejected the position of the Third Circuit and said:

> "We conclude that 'may be required' is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." *National Labor Relations Board v. In-*

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curred in the defense of any such action by the Union, together with such costs additional as the court may fix or assess against said member." Section 4, Article XVII, Constitution of the International Union of Operating Engineers.

dustrial Union of Marine-Shipbuilding Workers of America, 391 U.S. 418 at 426 (1968).[3]

Once it is established that the proviso in 29 U.S.C. § 411(a)(4) is a policy guide for the courts and not a grant of authority to the union, and we think that at least this much is established by *Marine Workers, supra,* then for the purpose of examining the limits of permissible union discipline we are left with these words:

> "No labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency." 29 U.S.C. § 411(a)(4).

Appellants urge that in this case the rights which Burroughs sought to protect were member rights as distinguished from employee rights, that the subject matter of the state and federal court actions concerned intra-union matters and did not touch the public domain, and that the actions in the state and federal courts were not brought in good faith,[4] and that for each or all of these facts Burroughs should be denied relief. Although appellant's position is not foreclosed by existing case[5] authority we do not adopt it.

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[3]This conclusion had been reached by the Courts of Appeals for the District of Columbia, and the Seventh Circuit. Roberts v. N.L.R.B., 350 F. 2d 427 (CA DE 1965); Ryan v. I.B.E.W., 361 F. 2d 942 (7 Cir. 1966).

[4]The District Court concluded that the doctrine of "clean hands" did not preclude relief. If there were a relevant issue of good faith, the summary judgment could not stand in this case because conflicting inferences could be drawn from the record.

[5]The rights involved in Marine Workers were employee rights protected by § 7 of the National Labor Relations Act (29 U.S.C. § 157) and the court does say: "Thus § 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play." Marine Workers, *supra* at 424.

And: "We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not ground for expulsion from a union." Marine Workers *supra,* at 428.

In Ryan v. International Brotherhood of Electrical Workers, 361 F. 2d (7 Cir. 1966) the basic controversy did not relate to an exclusively internal union matter, and in Roberts v. N.L.R.B., 350 F. 2d 427 (C.A. D.C. 1965), the rights involved were employee rights. Both Ryan and Roberts suggest that the element of good faith might be considered if the suits were brought to harass.

Section 411(a)(4) speaks of—"an action in any court." The word "action" is in no way limited and there is nothing in the Act which distinguishes between suits involving member[6] as opposed to employee rights, between suits involving internal as opposed to external union problems, or between suits brought in good faith as opposed to those brought in bad faith. The right to sue is something less than fully protected[7] by the "protection of the right to sue" section of the "Bill of Rights of Members of Labor Organizations" if a member of a union is required to make a pre-suit determination that the union may not discipline him for bringing it because upon a post-suit examination of the matter it will appear to some union official or judge that the member's action was brought in good faith, that the suit concerned affairs of the union touching some part of the public domain affected by the Act[8] rather than internal union affairs, or that the rights sought to be protected were "employee" rather than "member" rights. We believe that the language of the Act requires us to reject the considerations urged upon us by appellants and that the policy of the Act is served by such rejection.

What is said here does not deny the Union freedom of self-regulation. Courts have refused to meddle in union management and we do not suggest that they should not continue to refuse. We agree with Mr. Justice Harlan, who said in a concurring opinion in *Marine Workers*:

> "Finally, it is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members "to exhaust reasonable hearing procedures" within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." N.L.R.B. v. Marine Workers, at 429.

Likewise, we do not condone the use of law suits for harassment purposes and do not suggest that a union would not have all of the

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[6] § 411(a)(4) uses the word "member", not "employee".

[7] See the concurring opinion of Mr. Justice Harlan in N.L.R.B. v. Marine Workers, 391 U.S. 418, 428 (1968); Ryan *supra*, note 3.

[8] Even after the fact this problem is troublesome. See the differing opinions in local 283 v. United Automobile Aircraft, etc., 145 NLRB 1097 (1964).

rights which the law gives to those who are so harassed.[9] What we do say is that the freedom to sue is precious; that the winner in a lawsuit should not have the right to discipline the loser; that the potential suitor should not be subjected to the threat of such discipline; and that by virtue of § 411(a)(2) these principles now apply to labor unions.

29 U.S.C. § 412 provides that rights secured by the Bill of Rights may be protected by an action in the district court for such relief, including injunctions, as may be appropriate. Given this statute, may a court refuse an injunction in an otherwise proper case on the ground that the plaintiff has unclean hands? If we are correct in our conclusions that there are no exceptions to the law forbidding labor unions from disciplining their members for bringing actions, then the attempts to discipline Burroughs in this case were illegal regardless of his good faith or lack of it. In this case the duty to enjoin the illegal acts stems from a specific statutory grant and not from the general equitable powers of the court. For the same reasons that we refuse to read any limitations into § 411(a)(4), we refuse to read limitations into § 412.

The judgment is affirmed.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The majority opinion surely cannot survive, since it tends to establish almost complete immunity for union members who harass their unions and disrupt union affairs with vexatious lawsuits. The majority, in cases like this, would divest the District Courts, sitting in equity, of power to deny equitable relief, however unclean might be the hands of the union member seeking such relief. I refer specifically to footnote 4 of the majority opinion, which reads, "If there were a relevant issue of good faith, the summary judgment could not stand in this case because conflicting inferences could be drawn from the record." My Brothers then decide that the faith of the plaintiff, good or bad, in filing his "eleventh-hour" lawsuits was not a relevant issue in this equitable proceeding, and to me, the conclusion is almost incredible!

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[9] "Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted." Insurance Company v. Bailey, 13 Wall 616 (1871).

The issue is clearly framed: Did Congress, in granting jurisdiction to issue injunctions for the protection of the legitimate rights of union members, intend to abolish a defense that has been recognized in courts of equity since their inception? I have found nothing in the legislative history of the Act[1] that indicates the slightest Congressional intention to effect such a revolutionary abolition of historical judicial power. Nor can I believe that the Congress would have chosen to manifest such an intention and work such a dramatic consequence by an approach *sub silentio*. Without a clear legislative mandate, the majority denies several hundred years of judicial history to reach a result that I cannot accept.

The equitable remedy of injunctive relief historically has been available only when a set of extraordinary circumstances renders relief by way of damages inadequate to protect the rights of the plaintiff. The remedy has always been jealously guarded from improper use, equity courts taking the position that circumstances requiring extraordinary relief cannot exist when the plaintiff himself has engaged in meretricious conduct in relation to the controversy. It has been axiomatic that equitable relief will not be granted in a case wherein the plaintiff comes to the court with unclean hands.

The majority reasons that the traditional equitable principle is not applicable to this action, since the District Court's jurisdiction arose from a specific statutory grant and not from the general equitable powers of the court. As far as I know, however, the fact that a remedy may be statutority prescribed in general terms has never before been held to divest an equity court of its power to apply equitable rules and policy in deciding whether, in a particular set of circumstances, that remedy is appropriate. This is not, for example, a case in which a jurisdictional statute specifies particular remedies for a particular action. In such a case, a court might be disempowered to add equitable relief to specified statutory remedies, or in lieu thereof. *See, e.g., Herbold Laboratory, Inc. v. United States* (9th Cir. No. 22,105, June 26, 1969). Here the pertinent statute[2] is very similar to that involved in *Mitchell v. Robert*

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[1]Labor-Management Reporting & Disclosure Act of 1959, 29 U.S.C. §§ 401 et seq.

[2]The jurisdiction of the District Court was based on 29 U.S.C. § 412:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

DeMario Jewelry, Inc., 361 U.S. 288, 4 L. Ed. 2d 323, 80 Sup. Ct. 332 (1960). In *Mitchell* the Supreme Court held that sections 15 (a)(3) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215(a)(3), 217, which granted the District Courts jurisdiction to enjoin the discharge of employees for having filed actions against their employers, carried with them the full equitable powers of the District Courts. The provisions there in question are comparable to those with which we are here concerned, those guaranteeing a member's right to sue his union. The question involved in *Mitchell* was whether the District Courts had been disempowered, by reason of the Fair Labor Standards Act, from rendering equitable relief beyond the injunctive power specifically conferred. In answering the question in the negative, the Supreme Court principally relied upon language found in *Porter v. Warner Co.*, 328 U.S. 395, 397, 90 L. Ed. 2d 1332, 66 Sup. Ct. 1086 (1946):

> ". . . the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'* Brown v. Swann, 10 Pet. 497, 503." (Emphasis added.)

The question put at the beginning of the last paragraph of the majority opinion is whether injunctive relief should be denied in "an otherwise proper case" because of the plaintiff's unclean hands. This is not merely a rhetorical question. In my judgment, it is one that points out the majority's inconsistency, for it is the obligation of the court to determine what is a proper case under the statute. *See Mitchell v. Robert DeMario Jewelry, Inc., supra.*

Determining what is a proper case for the statutory remedy requires construing the statute in light of the general scheme which it portrays and its purposes. The basic purpose of the Act was to ensure democracy within union organizations. *See, e.g.*, S. Rep. No. 187, H. Rep. No. 741, Conference Rep. No. 1147, 86th Cong. 1st Sess. (1959). It is fundamental, however, that no democracy can function if its processes may constantly be disrupted and delayed. Therefore, the interests of the union and its members, as well as those of our society generally, in maintaining orderly union processes are as important as the right of an individual member to

challenge those processes. *Phillips v. Osborne,* 403 F.2d 826 (9th Cir. 1968).

The Supreme Court recognized the interests of the unions in *NLRB v. Industrial Union of Marine Workers,* 391 U.S. 418, 20 L. Ed 2d 706, 88 Sup. Ct. 1717 (1969), the principal case upon which appellee relies, when it noted that "§ 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned." In addition to the protection provided by § 8(b)(1)(A) we should take note that the statute here in question simply provides that "It shall be unlawful for any labor organization . . . to . . . discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter." 29 U.S.C. § 529. If a union member abuses a right by exercising it to inflict vexatious, vindictive harassment, an equity court should no longer protect that right. Surely, the statute must afford room for properly conducted disciplinary proceedings against a member who abuses his rights by exercising them in bad faith.

The majority is concerned that to allow the defense of unclean hands in this action would have the ultimate effect of "chilling" the exercise of the member's right to sue by forcing the potential plaintiff to make a gambling decision based on the probability of whether it will later be determined that he acted in good faith. I am not much disturbed by this possibility, however, since the potential plaintiff could be assured that a finding of good faith would necessarily follow a determination that he had a reasonable basis for belief in his chances of legal victory.[3] I am much more concerned with the possibility that a malicious disgruntled member could force his union to waste the resources of his fellow members in defending unmeritorious lawsuits instituted at the last moment to thwart or delay a scheduled election.

The majority suggests that the problem of abuse is amply covered by the availability to the union of injunctive relief to forestall

[3]A sound analogy can be drawn from the law of torts involving malicious prosecution of civil suits. The defendant in a malicious prosecution case must be shown to have had no probable cause for filing his original suit. Lack of probable cause must be "clearly proven." *E.g., Standley v. Western Auto Sy. Co.,* 319 S.W.2d 924 (Mo. 1959); *Virtue v. Creamery Mfg. Co.,* 123 Minn. 17, 142 N.W. 930 (1913). Also, reliance on the advice of counsel is conclusive on the issue of probable cause if counsel was informed as to all the material facts. *E.g., Harter v. Lewis Stores, Inc.,* 240 S.W.2d 86 (Ky. 1951).

vexatious or oppressive suits. I see this rationale as far-fetched, based upon unwarranted assumption that the union will always be knowledgeable, in advance, of all litigious courses which a disgruntled member might intend, or choose, to follow.[4] Moreover, the union could not ordinarily seek an injunction in such a case except to prevent the member from undertaking to relitigate issues that have already been decided. *See Clinton v. United States*, 297 F.2d 899 (9th Cir. 1961); *Helene Curtis Industries v. Sales Affiliates*, 247 F.2d 940 (2d Cir. 1957). Furthermore, courts will not enjoin the pursuit of relitigation of formerly adjudicated issues in an area of law that is unsettled. *See, e.g., Texaco, Inc. v. Fiumara*, 232 F. Supp. 757 (E.D. Pa. 1964). These restrictions evidence extreme reluctance on the part of courts to grant injunctions against the institution or continuation of litigation. In view of the statutory guarantee of the member's right to sue, an injunction prohibiting, initially, the exercise of that right, as the majority suggests, is an anomalous prospect indeed!

On the other hand, it is likely that any relief that the union might have at law would be woefully inadequate. Until quite recently, the cause of action for malicious prosecution has been limited to wrongs perpetrated by means of the criminal processes. *See generally* 1 F. Harper & F. James, Torts § 4.8, at 326 (1956); C. Prosser, Torts § 99, at 662 (1959). Some jurisdictions have now begun to recognize a cause of action for the malicious prosecution of civil actions, but it is doubtful that a union's recovery of a money judgment would be meaningful in the context of a dispute

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[4]For this type of injunctive action effectively to protect a union, virtual omniscience would be required of both the union and the courts. An injunction against litigation must specify the parties and the subject matter of the proposed lawsuit. *See American Electrotype Co. v. Kerschbaum*, 105 F.2d 764 (D.C. Cir. 1939). With the wide range of subjects open to a litigious member, it would be virtually impossible to frame an injunction with the requisite specificity without rendering it impotent for the purpose that it would be hoped to serve. A practical objection to the majority's approach is that the union would probably gain no greater advantage, economic or otherwise, by undertaking to obtain an injunction than by waiting for the frivolous lawsuit against it and defending on the merits. The expense of an equitable proceeding, with the subtle factual and legal issues involved, could easily exceed the cost of defending groundless lawsuits. An injunction should never issue unless it is clearly demonstrated that it will benefit the party who seeks it. *See, e.g., Simms v. Green*, 161 F.2d 87 (3d Cir. 1947).

with one of its ambitious and disappointed members.[5] It is not unreasonable to assume that a judgment-proof member could conceive it to be advantageous to him to pursue a course of harassment, hoping to extort his desired result. I cannot join in an opinion that appears to encourage such a course of action.

It is inconceivable to me that Congress could have intended to strip the District Courts, sitting in equity, of their historical power to do equity in the most exalted sense. I keenly regret that the majority has opened the way for a malicious and disruptive member to sue his union for the purpose of harassment and yet avoid union discipline despite his obviously unclean hands. I respectfully submit that the majority's conclusion defeats the fundamental goal of the Act, the assuring of the equitable functioning of democratic union processes.

If the majority is correct in its view that the pleadings and affidavits sufficiently presented a genuine dispute concerning the doctrine of unclean hands, then I strongly disagree with its conclusion that the District Court had no power to apply the defense. I would therefore remand the cause for the District Court's determination, in a plenary proceeding, of whether the appellee, by his own conduct, had forfeited any right to the favor of equitable relief.[6]

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[5]The elements of the cause of action make recovery extremely difficult. The original action or actions must have been instituted out of spite or malice and without probable cause. As noted earlier, probable cause in this context may be satisfied by any semblance of a sound case. *See* note 3, *supra.* Some jurisdictions limit the cause of action so that it reaches only repeated suits filed solely for the purpose of harassment. *See Soffos v. Eaton,* 152 F.2d 682 (D.C. Cir. 1945).

[6]An enlightening decision in the area of union disciplinary procedures, rendered on August 25th of this year, has just now, and after the above was written, come to my attention. *International Molders' & Allied Workers Union, Local No. 125,* 178 NLRB No. 25, 1969 CCH Lab. L. Rep. ¶ 21,164 (1969). There, the Board ruled that a union member who filed a decertification petition may be expelled from the union but cannot be fined. The Board carefully differentiated between discipline for filing unfair labor practice charges, as in *Marine Workers,* and discipline based on petitioning for decertification. It then cited our court's opinion in *Price v. NLRB,* 373 F.2d 443 (9th Cir. 1967), for the proposition that a union can expel a member for filing a petition to decertify. The rationale of Price was that the petition of decertification attacked the very existence of the union and that the member should not be able to do this while

remaining a member and privy to his union's election campaign and strategy.

In *International Molders'*, the Board did not interpret *Marine Workers* as requiring that it abandon its attitude toward decertification petitions. In addition to the reasoning in *Price*, noted above, the Board pointed out that suspension or expulsion was the most effective means of defense against the decertification petition and that the member's right of access to the Board should, on balance, give way to the union's right of self-defense. On the other hand, the Board concluded that a fine alone served no adequate defensive purpose, since the member would retain his advantageous position for in-fighting. Interestingly enough, the dissenting opinion in the case does not challenge the majority's conclusion that *Price* remains viable. Instead, it urges that the union should also be empowered to fine its members for filing decertification petitions.

The analogy to our present situation is apparent. Here, Burroughs' actions threatened, and undertook to frustrate, the union's ability to conduct an election, without which the union could not function as a truly representative organization. The sanction was, by its terms, designed as self-defensive, and Burroughs was not divested of his membership. The disciplinary order imposing the fine was suspended upon the condition that Burroughs not file another similar suit within the next three years. Such a conditional sanction can only be interpreted as defensive, and had the union eventually sought to impose it because of the good faith instituting of a non-frivolous action, the courts could have properly enjoined the imposition.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 22786

Operating Engineers Local Union No. 3, et al.,

Appellants,

vs.

B. R. Burroughs,

Appellee.

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered OCT 1 1969

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 22,786

Operating Engineers Local Union No. 3, an unincorporated association, The International Union of Operating Engineers, an unincorporated association, Harold L. Bowen, James F. Church, P. H. McCarthy, Jr., et al.,

Appellants,

vs.

B. R. Burroughs,

Appellee.

ORDER

Before: ELY and CARTER, Circuit Judges, and SMITH, District Judge.*.

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc. Judge Ely would grant the petition for rehearing.

*Hon. Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Walter Ely
United States Circuit Judge

Filed November 14, 1969,
Wm. B. Luck, Clerk.

Appendix D

REMARKS OF DISTRICT JUDGE

January 15, 1968, before Hon. Alfonso J. Zirpoli.

The Clerk: Burroughs v. Operating Engineers.

The Court: I assume that all you are praying for is partial summary judgment to enjoin? You are not asking for summary judgment as to liability or damages at this time?

Mr. Stark: That is correct. We are asking that the discipline be declared unlawful under the Labor Management Reporting and Disclosure Act and therefore unenforceable. We are asking for it to be permanently enjoined at this time.

The Court: You say, "It is further ordered, adjudged and decreed that defendant,"—and so on. This is a pretty broad order because let's assume for a moment that there may be some justification for your past actions. Am I to conclude that having one court ruling you will be justified in saying that a repeated action of the same nature would be the same?

We then end up with a sham that might very well be the basis for discipline. In other words, if the action ceased to be in good faith, isn't your suggested order too broad?

Mr. Stark: Yes, Your Honor, I think you are right.

The Court: I am going to grant partial summary judgment but you better prepare a proposed order that I am prepared to sign. The one that you submitted I am not prepared to sign. All I am basically

going to enjoin is a finding suspending for the moment the past court activity, not for any possible future. I will suggest that you prepare an order accordingly.

Mr. Stark: I will do so, Your Honor.

Mr. McCarthy, Jr.: Will that be based on any particular findings of fact?

The Court: Well, the order will be based on findings of fact, yes. I think the basic findings are going to be there was further discipline on the part of the Union and that the Union is without authority to further discipline.

I would suggest that you take a look at Rhine v. International Brotherhood of Electrical Workers 361 Fed. 2nd and use that as the basis for a finding and conclusion and order of the Court. The finding is going to be a recitation of what transpired and thereafter on the authority of this case the order will be granted for partial summary judgment in the manner indicated.

You might mention the Union provisions with relation to disciplining and if they constitute further disciplining because of court action, then such disciplining under the facts of this case would be illegal because this isn't the equivalent of a sham court action. There is nothing here to show there wasn't good faith on the part of the members. You might submit your form to counsel and seek approval as to form.

Mr. Stark: I will do that, Your Honor.

Appendix E

United States District Court
for the Northern District of California
Southern Division

No. 47696

B. R. Burroughs,
Plaintiff,
vs.
Operating Engineers Local Union No. 3, an unincorporated association, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

Plaintiff's motion for partial summary judgment raises no genuine issue as to any material fact.

II

Plaintiff is, and has been for the past approximately twenty-five years, a member of Operating Engineers Local Union No. 3 within the meaning of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USC 402 (o). Plaintiff has over the years actively participated in union affairs and has held various positions of trust in said union.

III

Defendants Operating Engineers Local Union No. 3 and International Union of Operating Engineers are, and at all relevant times have been, labor organizations within the meaning of the LMRDA, 29 USC 402 (i).

IV

On August 24, 1966 plaintiff filed action No. 88942 against Operating Engineers Local Union No. 3, et al., in the Superior Court of the State of California, for the County of San Joaquin. Said action sought to enjoin the union from proceeding with its regularly scheduled election of officers. Said action was instituted through and upon the advice of counsel. The action was dismissed.

V

On September 9, 1966 plaintiff filed action No. 9933 against Operating Engineers Local Union No. 3, et al., in the United States District Court for the Northern District of California, Northern Division, seeking to enjoin the regularly scheduled election of Local 3 officers. Said action was instituted through and upon the advice of counsel. Said action is presently pending in said court.

VI

Subsequent to the institution of said legal actions a written specific charge was served upon plaintiff in relation to the filing of the aforementioned San Joaquin Superior Court action. Said charge was that plaintiff:

> violat[ed] Article 3, Paragraph (c), Article 27 of the Local Union By-Laws and Article 17, Section

4 of the Constitution of the International Union of Operating Engineers [in that]

On the 23 day of August, 1966, he commenced a civil action against Operating Engineers Local Union No. 3 in the Superior Court of the State of California, for the County of San Joaquin, No. 88942, in which action he sought [certain specified relief] without in the (4) months next preceding commencement of the civil action or at any time having exhausted all or any rights, remedies and reasonable provisions for hearing and appeal within the organization.

VII

A further charge, substantially the same as that set forth in Finding VI above, was served upon plaintiff in relation to the filing of the aforementioned United States District Court action.

VIII

Plaintiff was found guilty of the charges referred to in Findings VI and VII by the membership of Local 3 and fined a total sum of $7,158.33. The International Union of Operating Engineers upheld the propriety of the charges, trials, guilty findings and fines, staying enforcement of the penalties imposed upon the condition that plaintiff not, within three years, directly or indirectly violate Article XVII, Section 4 of the International Constitution.

IX

The Constitution of the International Union of Operating Engineers, Article XVII, Section 4 provides:

No suit or other action at law or equity shall be brought in any court and no proceedings shall be initiated before any administrative agency by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and reasonable provisions for hearing, trial and appeal within the organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. This provision shall only require resort to internal remedies for a period not exceeding (four) months. Any member violating this provision, shall, in addition to the penalties prescribed in the constitution and ritual, be subject to a fine equal to the full amount of the costs incurred in the defense of any such action by the Union, together with such costs additional as the court may fix or assess against said member.

Conclusions of Law

From the foregoing facts the court concludes:

I

The court has jurisdiction of the parties and subject matter herein.

II

The doctrine of "unclean hands" does not preclude plaintiff from obtaining relief.

III

That the discipline of plaintiff based upon the charges set forth above was and is in violation of Sections 101(a)(4) and 609 of the Labor Management Reporting and Disclosure Act (29 USC 411(a)(4),

529) in that it limits the right of plaintiff to institute actions under said Act and disciplines a member for exercising rights to which he is entitled under said Act.

IV

Article XVII, Section 4 of the Constitution of the International Union of Operating Engineers is similarly in violation of said Act as applied to the facts as found above.

Dated: February 13, 1968.

Alfonso J. Zirpoli
Judge of the United States
District Court

Appendix F

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Attorneys for Defendants

United States District Court
For the Northern District of California
Southern Division

No. 47696

B. R. Burroughs,
Plaintiff,
vs.
Operating Engineers Local Union No. 3, an unincorporated association, et al.,
Defendants.

ORDER

Plaintiff's action for partial summary judgment having come on for hearing on January 15, 1968, and the Court having considered all matters relating thereto and having made its findings of fact and conclusions of law:

It Is Hereby Ordered, Adjudged And Decreed that the discipline imposed upon plaintiff by defendant

Labor Organizations because plaintiff instituted a legal action or legal actions without having first exhausted four months internal union remedies under the facts of this case is in violation of 29 U.S.C. Sec. 411(a)(4), illegal and void, is hereby quashed, vacated and set aside.

It Is Further Ordered, Adjudged And Decreed that defendant Labor Organizations and each of them are forever enjoined from in any way disciplining plaintiff by reason of his having commenced and prosecuted Case No. 88942 in the Superior Court of the State of California in and for the County of San Joaquin and thereafter Case No. 9933 in the United States District Court for the Northern District of California, Northern Division or either of them.

And It Is Further Ordered, Adjudged And Decreed that there being no just reason for delay let a final judgment be entered accordingly as to the Injunction.

Dated: FEB 13 1968

Alfonso J. Zirpoli
Judge, United States District Court

Filed February 13, 1969,
Clerk, U.S. Dist. Court, San Francisco.

Appendix G

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Title I

Section 101(a)(2)

(2) Freedom of Speech and Assembly—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions, and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 101(a)(4)

* * * * * * *

(4) No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative pro-

ceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association, shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

* * * * * * *

Section 102

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Title VI

Section 609

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 102 of

this title shall be applicable in the enforcement of this section.

Constitution of the United States, Article III, Section 2, Clause 1.

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;— to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.